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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

**IN RE**

**1998 BIENNIAL REGULATORY REVIEW -- REVIEW OF THE COMMISSION'S BROADCAST OWNERSHIP RULES AND OTHER RULES ADOPTED PURSUANT TO SECTION 202 OF THE TELECOMMUNICATIONS ACT OF 1996**

MM Docket No. 98-35

# COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

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## SUMMARY

The more than 600 television stations affiliated with the ABC, CBS and NBC networks urge the Commission to preserve the national television ownership rule and the cable/television ownership rule. Although the Affiliates have favored elimination of unnecessary regulations on the networks – we supported measured liberalization of the national cap, elimination of the 12-station limitation, and elimination of the financial interest and syndication rules, for example – these two rules are minimally intrusive structural regulations that protect the integrity of the network-affiliate partnership and safeguard the public interest by maintaining competition and diversity in the broadcast marketplace. They should be retained.

The regulatory structure enabled by these rules properly emphasizes the local control that is a crucial determinant of the success of the network-affiliate partnership. As networks increase in size and control ever-greater numbers of broadcast stations in the largest markets, the balance of power over the Nation's distribution system shifts away from the diverse group of local network affiliates and toward centralized control by national programmers. By preserving a balance in the relationship between networks and affiliates and preventing a concentration of economic power, the national ownership cap allows affiliates to make local programming decisions while permitting the networks' interest in building an audience for high-quality national programs. The prior 12-station national television ownership rule was evaluated and dramatically expanded to permit ownership of any number of stations subject only to a national cap of 35 percent by Congress only two years ago. Congress clearly intended this new rule to be an enduring element of our regulatory structure, and the same policy reasons that Congress adopted the rule in 1996 exist even more dramatically today.

The cable/television cross-ownership rule serves the twin goals of competition and diversity by checking the unquestionable market power of cable operators and preserving the operation of the local television marketplace. Local television stations compete with cable and depend upon cable carriage for their continued viability. The unrestrained combination of a broadcast station and a local cable operator would be certain to result in suppression of competition and diversity in the marketplace. This skewing of the local marketplace would be particularly egregious in cases where cable multiple system owners merge with broadcast television networks. In this era of cable power, it is perverse to contemplate granting cable systems additional leverage over local stations.

## CONTENTS

**ATTACHMENT**

PHILLIP A. BEUTEL, HOWARD P. KITT, AND LINDA MCLAUGHLIN, NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., *BROADCAST TELEVISION NETWORKS AND AFFILIATES: ECONOMIC CONDITIONS AND RELATIONSHIP -- 1980 AND TODAY* (OCTOBER 27, 1995).

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| In the Matter of<br><br>1998 Biennial Regulatory Review --<br>Review of the Commission's Broadcast<br>Ownership Rules and Other Rules Adopted<br>Pursuant to Section 202 of the<br>Telecommunications Act of 1996 | )<br>)<br>)<br>)<br>)<br>)<br>) | MM Docket No. 98-35 |

TO: The Commission

**COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE**

The Network Affiliated Stations Alliance ("NASA" or the "Affiliates")[1] urges the Commission to preserve the national television ownership rule and the cable/television cross-ownership rule in its biennial review of ownership rules.[2] These two structural regulations are critical to assuring viewpoint diversity and avoiding undue concentration in local communities. Proposals to relax or eliminate either rule would have profound adverse consequences on the network affiliate system in particular and the television broadcast system in general.

The essential touchstone in this proceeding is the Telecommunications Act of 1996 (the "1996 Act") and the intent of Congress in crafting that Act. Congress intended the 1996 Act and the Commission's subsequent regulatory reviews to advance the goals of competition, diversity, and localism. The Conference Report introduces the Act as "pro-competitive" legislation;[3] the House report emphasizes the 1996 Act serves the goals of increasing "competition and diversity," while "maintaining several independent

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[1] NASA is an informal coalition of the affiliate associations of the ABC, CBS and NBC Television Networks.

[2] *See Notice of Inquiry,* MM Docket No. 98-85, released March 13, 1998. The Commission published its *Notice* in accordance with Section 202(h) of the Telecommunications Act of 1996. Section 202(h) directs the Commission to "determine whether any of such rules are necessary in the public interest as a result of competition" and "repeal or modify any regulation it determines to be no longer necessary in the public interest." Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996).

[3] H. Rep. No. 104-458 at 1 (1996).

voices in each local market;"[4] and the Senate report stresses the importance of "localism concerns."[5] The *Notice* recognizes that these objectives are critical parts of the Commission's public interest mandate.[6]

Both the national ownership rule and cable/television cross-ownership rule further these public interest goals. The national ownership rule is the essential mechanism that maintains the balance between networks and their affiliates to ensure that affiliates can program their stations in the interests of the communities they are licensed to serve. The cable/television cross-ownership rule ensures that local television markets remain competitive by ensuring that television-cable combinations do not skew competition and stifle innovation. There is no public interest justification for modifying either rule.

## I. INTRODUCTION

### A. THE NATIONAL OWNERSHIP CAP AND THE BROADCAST-CABLE CROSS-OWNERSHIP RULE ARE CRUCIAL TO AFFILIATES' LOCAL PROGRAMMING AUTONOMY.

The rules with which these comments are concerned exist to protect the diversity and vibrancy of the U.S. television marketplace. They operate at both the national and local level. At the national level, the 35 percent audience cap ensures that ownership of television is not dominated by a few mega-companies and that the beneficial decentralization of ownership that has characterized American broadcasting is able to continue.[7] At the local level, the cable-broadcast cross-ownership rule ensures that local media combinations of currently competing companies do not stifle competition and innovation. These benefits are intuitive and well established by Commission and congressional decisions over decades of the Commission's stewardship of the television

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4 H. Rep. No. 104-204 at 118-19 (1995).

5 S. Rep. No. 104-23 at 69 (1995) (additional views of Sen. Hollings).

6 *Notice* at ¶ 4.

7 In the United States, there are 1,561 television stations owned by some 475 licensees. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report,* CS Docket No. 97-141, at ¶¶ 91, 93 (Jan. 13, 1998) ("*Fourth Annual Report*").

marketplace.[8] These comments, however, focus most directly on the need to retain these rules to preserve the network-affiliate distribution system.

The heart of our system of free, over-the-air broadcasting is the local programming provided by broadcasters in response to the needs and interests of their stations' communities. The ability of a network-affiliated broadcaster to respond effectively and comprehensively to its community depends largely on the freedom of the affiliate to interleave programming responsive to its *local* community with the *national* programming provided by the affiliate's network.[9] The broadcaster's ability to achieve this freedom, in turn, depends on the terms of the agreements that networks and affiliates are able to strike.[10] The terms of these agreements are defined by the bargaining power between networks and affiliates.

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[8] *See, e.g., Notice* at ¶ 4 ("for more than half a century, the Commission's regulation of broadcast service has been guided by the two goals of promoting competition and diversity"); *Fourth Annual Report* at ¶ 3 ("the 1996 Act was intended to establish a pro-competitive deregulatory national policy framework for the telecommunications industry") (citations omitted); *Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd. 3524, ¶ 15 (Jan. 17, 1995) (an "important part of the Commission's public interest mandate is to promote competition, because competition promotes consumer welfare and the efficient use of resources").

[9] H. Rep. No. 100-887, 100th Cong., 2d Sess. 20 (1988) (U.S. system combines the "efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public"); *Report on Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, 5 F.C.C. Rcd. 4962, 5037 (1990) ("considerable credit for its existence must go to the framework in which it is broadcast . . . a framework formed by the national programming networks . . . [and local stations'] synergy of local and national offerings"); *Scrambling of Satellite Television Signals (Report)*, 2 F.C.C. Rcd. 1669, 62 R.R.2d 687, 732 (1987) ("a true partnership serving the interest of both partners and the public interest by combining efficiencies").

[10] The Commission has long recognized that local programming decisions must be made by the affiliate and must not be dominated by network influence. *See Report on Chain Broadcasting* 66 (Docket 5060, May 1941) ("*Chain Broadcasting Report*") (broadcaster is not fulfilling its obligation to its community "if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory"), *modified, Supplemental Report on Chain Broadcasting* (1941), *appeal dismissed sub nom. NBC v. United States*, 47 F. Supp. 940 (1942), *aff'd*, 319 U.S. 190 (1943); *Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting*, 63 F.C.C.2d 674, 690 (1977); *Cosmopolitan Broadcasting Corp.*, 59 F.C.C. 2d 558, 561 (1976) (this "responsibility can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments").

The network-affiliate partnership exists in an environment where past regulatory and structural decisions have guaranteed that there can never be a functioning "free" marketplace on a playing field that is level for both parties. By virtue of Commission and Congressional spectrum-allocation and ownership decisions permitting networks to own stations in the largest markets in the United States, networks in this country operate in a unique capacity. In some markets, they are purely vertically integrated and bring programming they own or acquire directly to local audiences. In other markets, they need local outlets – free over-the-air television broadcast stations – to bring national programming to local audiences. The networks' ownership of direct distribution mechanisms in markets covering as much as one-third of the United States creates unique bargaining power in the favor of networks.

This bargaining power exists for reasons that are as multi-faceted as the relationship between networks and affiliates. For one, networks – and syndicators venturing with networks – now can launch programs without the need to include affiliates in initial programming decisions because of the geographic reach of networks' holdings. For another, there are simply fewer affiliates in large markets that can negotiate with networks on more even terms; the impact of a decision not to broadcast a particular network program on the part of an affiliate in Wichita simply has less impact on the network's national distribution of that program than a similar decision by an affiliate in Washington. Negotiation of preemption "baskets" and other devices that limit, perhaps inappropriately, the ability of affiliates to program more extensively in response to local interests is dramatically affected by the size of the markets and extent of ownership on the affiliate side of the equation. Expansion of a network's geographic and population coverage translates directly into an extension of the power networks hold over affiliates, and this increased leverage has a direct and undeniable impact on affiliates' day-to-day local programming decisions.

The 1996 Act created unprecedented opportunities for networks to acquire broadcast stations. Before the 1996 Act, the networks could own only 12 television stations apiece.[11] Typically, these stations were in large markets, and the major networks

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[11] *See* 47 C.F.R. § 73.3555 (1995); *Amendment of Multiple Ownership Rules*, 100 F.C.C.2d 17 (1984), *recon. granted in part*, 100 F.C.C.2d 78 (1985).

each covered some 25 percent of the country with owned-and-operated television stations. The 1996 Act eliminated the 12-station limit altogether and replaced this direct and longstanding limitation with a simple 35 percent audience cap (a limitation that two networks now approach). Affiliates now negotiate with vertically integrated networks that have economic power that dwarfs the pre-1990 networks – the networks own an expanded number of broadcast stations; they are owned by some of the largest corporations in America; they are integrated with production companies of various sizes (ranging from Disney to 20th Century Fox to Eyemark); and they all have and are exploring methods of reaching local markets through media other than local affiliated television stations. Accordingly, any proposed expansion of the 35 percent cap or any combination of networks and cable multiple-system owners has a direct and significant impact upon the ability of affiliates to negotiate the terms of affiliation under which they can appropriately serve local audiences.

### B. THE BALANCE OF POWER IN THE NETWORK-AFFILIATE RELATIONSHIP CONTINUES TO TILT IN DRAMATIC FAVOR OF THE NETWORK.

Changes in the broadcast marketplace have not altered the essential balance of power between networks and affiliates. Because the value of a network affiliation continues to be substantial, and because the threat of losing that affiliation is too dangerous to risk in today's tenuous, competitive and fragmented broadcasting environment, networks can exercise significant power over affiliates. Affiliates, in practical and daily experience negotiating with the networks, have no more leverage today than in years past in effecting changes in the network affiliation contract to lessen network control over programming decisions.

By every appropriate direct measure of the network-affiliate relationship – including network compensation, network clearance rates and network-affiliate negotiations – affiliates have not gained increased bargaining power. Consideration of every valid external factor that has been raised to claim a change in the relationship between networks and affiliates – the growth of cable, the growth in the number of networks and stations, the growth in group ownership, and the value of affiliation – yields the same result. This truth is rooted in the reality of the business relationships with which the Affiliates are intimately familiar. It also was confirmed in 1995 by a comprehensive economic analysis of the network-affiliate relationship conducted by the National Economic Research Associates Inc. ("NERA").[12] NERA demonstrated convincingly that, in 1995, affiliates did *not* have greater bargaining power than they had in 1980. This conclusion has not changed since 1995: in the ongoing relationship between networks and affiliates, networks clearly and continually have the upper hand because of the overwhelming value of a network affiliation to a broadcast station.

It is simply not the case that affiliates have increased bargaining power as compared to the networks. It is, however, still the case that "the economic survival of [a] station may well depend upon . . . affiliation."[13] As NERA found, changes in the television marketplace "have not, on balance, demonstrably diminished the attractiveness of network affiliation for a television station."[14] The national television ownership rule and the cable/television ownership rule have furthered the ability of affiliates to serve their local audience and make unpopular and potentially risky decisions not to carry network programming.

## II. RELAXING THE NATIONAL TELEVISION OWNERSHIP RULE WOULD VIOLATE THE INTENT OF CONGRESS IN PASSING THE 1996 ACT AND RADICALLY SKEW THE BALANCE OF POWER IN THE NETWORK-AFFILIATE RELATIONSHIP TOWARD THE NETWORK.

The 1996 Act substantially relaxed the national ownership rule. The rule in effect when Congress crafted the 1996 Act was highly regulatory – it permitted a company to own 12 television stations subject to a 25 percent national audience cap, 12 FM radio stations and 12 AM radio stations. In the two years since the relaxation of this rule, group ownership has skyrocketed and the networks have gained unprecedented freedom

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[12] See Phillip A. Beutel, Howard P. Kitt, and Linda McLaughlin, National Economic Research Associates, Inc., *Broadcast Television Networks and Affiliates: Economic Conditions and Relationship -- 1980 and Today* (October 27, 1995) ("*NERA Study*") (attached).

[13] *Amendment of Section 3.658 of the Commission's Rules to Prohibit Television Stations, Other Than Those Licensed to an Organization Which Operates a Television Network, from Being Represented in National Spot Sales By an Organization Which Also Operates a Television Network*, Report & Order, 27 F.C.C. 697, 713 (1959). As the Commission continued, "network programs are not only a substantial source of direct income to the affiliated station; they also attract the viewing audience and provide valuable adjacencies for the affiliate to sell to national spot and local advertisers." *Id.* This also has not changed.

to own broadcast stations. The remaining structural regulation is minimally intrusive in the television and radio marketplace; it creates no restriction on the number of stations any group can own, subject only to the protective measure of a 35 percent audience cap for television only; it provides no restriction at all on the number of radio stations that a group can own;[15] and it imposes no restriction on networks' movement into cable-programming channels, satellite systems or programming channels, wireless cable, the Internet or other new media.[16]

Congress established this minimally intrusive rule deliberately. Unlike the case with other ownership rules administered by the Commission, Congress in the 1996 Act debated the appropriate level of ownership and mandated that result by statute. The 35 percent cap, then, should not be considered to be on the same footing as the rank-and-file administrative rules that are subject to the biennial review process. In the case of the national ownership cap, Congress meant what it said: the cap should be set at 35 percent. This result, which was a reasoned and fully debated compromise, resulted in a substantial relaxation of regulatory restrictions. It should be maintained.

### A. CONGRESS SET AN OBJECTIVE AND ENDURING OWNERSHIP CAP TO PREVENT MARKET CONCENTRATION.

In the 1996 Act, Congress, only after extensive hearings and debate on the issue, resolved to raise the cap on the amount of national audience a single broadcast licensee may reach from twenty-five percent to thirty-five percent. According to Congressman Markey, who was integrally involved in developing the Act, "[t]his policy decision reflects a carefully calibrated balance and I believe *the duly considered view of Congress*

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14 *NERA Study* at 1.

15 The networks, notably CBS, have taken advantage of this opportunity to expand into radio broadcasting. CBS currently owns some 185 radio stations. *See* DAILY VARIETY, July 8, 1998.

16 All the networks currently have non-broadcast cable investments. ABC is owned by Disney, which programs the Disney Channel and Toon Disney; ABC also programs several ESPN channels, Lifetime, Arts & Entertainment, and the History Channel, and it has launched a "soap" cable channel in three test markets; NBC programs CNBC and MSNBC; CBS programs Eye on People, The Nashville Network and Country Music Television. Each network operates extensive sites on the World Wide Web, some in conjunction with affiliates.

*on these matters should settle the issue for many years to come*."[17] Congress explicitly rejected proposals that would have given Commission the discretion to increase the ownership cap.[18]

In the debates over the ownership cap, Congress evinced deep concern with protecting competition and diversity. The Senate version of the bill, which would serve as the basis for the final bill, settled on a cap adjustment to 35 percent after narrowly rejecting an amendment to maintain the 25 percent cap. The Senate explicitly rejected a 50 percent cap as contrary to the public interest, noting that market concentration is especially dangerous in the communications context.[19] And many Senators feared that even the more modest 35 percent cap threatened to undermine competition and local diversity.[20]

Congressional concern over increased market concentration was so great that a Senate amendment to write into the 1996 Act a 25 percent cap actually passed before barely losing on a motion to reconsider.[21] During debate, numerous Senators expressed their intent to prevent market concentration, warning that higher caps could spawn "greater concentration of television ownership in this country, and we will end up with a half a dozen companies controlling virtually all the television stations in America."[22] In turn, concentration would limit diversity: "The networks will kick the dickens out of an

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17 141 Cong. Rec. H1170 (daily ed. Feb. 1, 1996) (statement of Rep. Markey) (emphasis added).

18 *See* 141 Cong. Rec. S8240-47 (daily ed. June 13, 1995) (statement of Sen. Dorgan, arguing on behalf of a subsequently rejected amendment that "the proper place to make that decision is at the Federal Communications Commission").

19 *See* 141 Cong. Rec. S7945 (daily ed. June 8, 1995) (statement of Sen. Kerrey: "[i]t does matter if we have one single individual controlling a significant portion of the local market, controlling our access to information."); *id.* at 7948 (statement of Sen. Dorgan: "I do not think we should say it is fine with us if one group or consortium decides to buy more and more television stations and we lift the ownership limit . . . to 50 percent- of the audience share. . . . [T]hat flies exactly in the opposite direction of competition.").

20 Senator Hollings, a supporter of the final bill, explained, "[a]ny modification in the national ownership cap is important because of localism concerns. Local television stations provide vitally important services in our communities. Because local programming informs our citizens . . . and provides other community-building benefits, we cannot afford to undermine this valuable resource." S. Rep. No. 104-23 at 69 (1995).

21 *See* 141 Cong. Rec. S8246-47 (daily ed. June 13, 1995).

22 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (statement of Sen. Dorgan).

affiliate if the affiliates do not toe the line."[23] As Senator Kerrey concluded, "[s]o in addition to the idea that this shifts us away from local control of stations, there is also the very important idea of concentration in the industry, and lack of competition."[24] After the amendment passed the full Senate, it was defeated later in the day, fifty-two to forty-eight, on a motion to reconsider.[25]

The House, which initially had been far more supportive of raising the national television ownership limitation, also rejected the proposed 50 percent cap as contrary to the public interest. The House version had originally called for a one-year, 35 percent cap followed by a 50 percent cap.[26] After pervasive disapproval, however, the House replaced the fifty percent cap with a 35 percent cap by a vote of 228 to 195.[27] The amendment's sponsor argued successfully that:

> [t]he drastic and indiscriminate elimination of mass media ownership rules proposed by this bill would eviscerate the public interest principles of diversity and localism. . . . Because American society is built upon local community expression, the policy favoring localism is fundamental to the licensing of broadcast stations.[28]

In addressing the 50 percent cap, one member seemed to speak for many when he stated his "fear that this increase would be detrimental to our local stations and the idea of local control."[29]

The provisions in the final bill were viewed as "much more reasonable than the extreme language" of earlier proposals.[30] The change was critical to passage of the legislation:

> [The earlier] language would have virtually guaranteed that power would have been concentrated among a select few communications megacorporations, sacrificing the key tenets of communications policy-community control and variety of viewpoints. . . . Thankfully, these

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23 141 Cong. Rec. S8242 (daily ed. June, 13, 1995) (statement of Sen. Helms).

24 141 Cong. Rec. S8245 (daily ed. June 13, 1995).

25 *See id.* at S8246-47.

26 *See* H.R. Rep. No. 104-204 at 40 (1995).

27 *See* 141 Cong. Rec. H8484-85 (daily ed. Aug. 4, 1995).

28 141 Cong. Rec. E1571, E1573 (daily ed. Aug. 1, 1995) (statement of Rep. Markey).

29 141 Cong. Rec. H8484 (daily ed. Aug. 4, 1995) (statement of Rep. Hall).

30 *See* 142 Cong. Rec. H1177 (daily ed. Feb. 1, 1996) (statement of Rep. Collins).

> provisions were altered by lowering to 35 the percentage of all national television viewers that one network's programming could reach.[31]

Other supporters of the bill who were inclined to maintain the twenty-five percent cap also rejected anything higher than 35 percent: As Senator Hollings said, "[a fifty percent cap] would be embarrassing for anybody to stand on the floor and ask for it. . . ."[32] The thirty-five percent cap was so significant to Congress that proponents of repealing the twelve-station cap[33] defended that provision by emphasizing that it would not raise the percentage of national viewership beyond the proposed thirty-five percent limit.[34]

Accordingly, it is clear that Congress did not intend for the Commission to begin a piecemeal evisceration of this crucially important rule. Congress spent hours of floor time debating and months of deliberations to establish the proper level of the rule. That level is 35 percent, and the Commission should maintain this level.

### B. LOOSENING OR ELIMINATING THE NATIONAL TELEVISION OWNERSHIP CAP WOULD INCREASE NETWORKS' MARKET POWER AND HARM THE PUBLIC INTEREST.

Restraints on the number of broadcast stations one party may own at the national level exist to serve two objectives: (1) furthering the First Amendment ideal of promoting the public welfare by providing diverse and antagonistic viewpoints;[35] and (2) promoting competition in order to ensure efficient use of resources. Proposals to loosen or eliminate the limitations on national broadcast ownership contradict these objectives and, if adopted, would increase centralization of control, thereby threatening the public interest by detrimentally affecting localism and diversity. Expanding or repealing the national ownership rule, contrary to Congress' mandate and the goals of the *Notice,* would favor the private interest of a small number of enormous companies at the expense of the interests of the public.[36]

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31 *Id.*

32 142 Cong. Rec. S717 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings).

33 Section 202(c)(1)(A) of the 1996 Act repealed the twelve-station cap.

34 *See* 141 Cong. Rec. S7898 (daily ed. June 7, 1995) (statement of Sen. Dole).

35 *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

36 The Commission's rationale for maintaining the 30 percent cable horizontal ownership limit supports preserving the 35 percent national television ownership cap. *See In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition*

By increasing the permissible audience reach cap of television station owners to 35 percent, Congress permitted unprecedented economic freedom in the broadcast marketplace. Since 1996, as the Commission recognizes, there has been a wealth of activity resulting in a more concentrated ownership of television.[37] The national ownership cap is no longer a serious impediment to substantial combinations of television ownership; a single company now can reach more than one-third of the country's population, and several networks and other companies already have taken advantage of this new freedom.[38]

But unrestrained reliance on a marketplace that is, by virtue of current ownership patterns and vertical integration, already skewed, does not serve the key goals of the Communications Act. The ownership rules were put into place to facilitate the development of a competitive television broadcast service, owned by multiple companies that provide a wide range and diversity in programming judgments and decisions.[39] Networks rely on their affiliates to support national programs with a mix of local and independently produced syndicated programming. Affiliates rely on the networks as a source of national programming to provide high quality entertainment, news, and sports

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*Act of 1992; Horizontal Ownership Limits*, MM Docket No. 92-264 (rel. June 26, 1998) ("*Cable Ownership M&O*") (concluding that a 30 percent limit would prevent the largest MSOs from gaining excessive leverage, and also ensure that the majority of MSOs continue to expand and benefit from the positive aspects of increased concentration).

[37] In 1996 alone, the number of television station owners dropped 21%. *See Fourth Annual Report* at ¶ 93 (citing BIA Companies, *TV Station Ownership Consolidates 21% As Telecom Act Takes Effect*, August 13, 1997, at 1). The Commission stated that "[a]cquisitions subsequent to [increase in ownership limits] resulted in consolidation of television station ownership." *Id.*

[38] For example, ABC owns the ABC Television Network and 10 television stations, which reach 24.2% of U.S. households, BROADCASTING & CABLE, June 22, 1998; CBS, in addition to its network, owns 14 television stations, DAILY VARIETY, July 8, 1998; NBC owns and operates the NBC Television Network and 13 television stations, PR NEWSWIRE, June 9, 1998; Paxson Communication owns 78 television stations, BUSINESS WIRE, June 23, 1998; Tribune Company, which recently completed the acquisition of television stations in Seattle and Grand Rapids, Michigan, owns 18 major market television stations and one national superstation, WGN, that is carried over cable networks, THE ORLANDO SENTINEL, June 9, 1998.

[39] *See Amendment of Multiple Ownership Rules*, 100 F.C.C.2d 17, 18 (1984) ("The stated purpose of the rule when it was adopted was twofold: (1) to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming, and (2) to safeguard against undue concentration of economic power.").

to the country. The general public benefits from the network-affiliate relationship by receiving both national and local programming.

Relaxing the 35 percent ownership limit inevitably would increase the networks' market power to the detriment of the local community.[40] Specifically, if networks can own or have significant interest in those stations that cover the most important markets in the United States, affiliates would no longer be able to maintain their independence to preempt inappropriate network programming in favor of important local news, public interest and local sports programming. Successful localism demands comprehensive local newscasts and public affairs programming. Localism certainly is not achieved by transforming local broadcast stations into "passive conduits for network transmissions from New York."[41]

Even outside of the network-affiliate context, the national ownership cap is crucially important to achieving a diverse and vibrant television marketplace. The cap is a content-neutral, minimally intrusive structural regulation that prevents massive consolidation of control from occurring in the broadcast industry. In the absence of a cap, a few large companies easily could control the entire broadcast industry in the United States. Opportunities for independent minority ownership would dwindle in an environment in which a smaller number of economically powerful entities provoke a consolidation of the industry.[42] Local and regional broadcasters no longer will be able to compete in the programming and advertising markets with enormous mega-companies and will be deprived of the programs and sales opportunities necessary to serve their

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40 H. Rep. No. 104-204 at 221 (1995) ("Deregulation of the audience cap will intensify concentration in the hands of the vertically-integrated, national television networks.").

41 H. Rep. No. 104-204 at 221 (1995).

42 The Commission and observers have long noted the nexus between ownership rules and minority ownership. *See, e.g., Multiple Ownership of Broadcast Stations*, 95 F.C.C.2d 360, 403 (1983) (Rivera, Comm'r, dissenting) ("in the new, post-rule environment, these conglomerates will bid up the prices of stations in most markets significantly"); *see also Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 COMM/ENT. L.J. 329, 428 (1986) ("liberalization of ownership rules could tend to make both established media and new media increasingly concentrated in the hands of fewer entities, at the expense of new entrants into the marketplace – especially minorities").

communities effectively.[43] Even major equipment purchases – the heart of the conversion to digital television and the lifeblood of all stations that work hard to bring technological advances in news and weather to their markets – would become disproportionately expensive to the local and regional broadcasters that have the smallest population across which to spread these costs.

The healthy and diverse breadth of viewpoints now available in television markets across the country will contract dramatically when only a few companies own virtually all broadcast stations. Syndication decisions would become even more dominated by larger and more powerful groups, leading major programming decisions to be made at a level at which local and regional broadcasters have little voice or meaningful opportunity to participate. This increase in consolidation will translate directly into diminished programming diversity. It is true, of course, that antitrust review could prevent particularly egregious combinations of broadcast stations; it is equally true, however, that communications policy exists to ensure diversity on grounds and to standards different from those entrusted to antitrust law. And case-by-case review when any party pushes the envelope would embroil the government and private parties in numerous, time-consuming and delay-inducing proceedings that now are prevented by a minimally restrictive structural regulation.[44]

The Commission questions whether the increased availability of other media warrants expanding the national ownership caps in broadcasting. Cable and the competing video media (*i.e.* multipoint distribution service, satellite master antenna television systems, direct broadcast satellites) are sufficiently different from free, over-the-air television to render their inclusion in the diversity analysis misleading. Unlike broadcast television, cable requires consumers to pay a subscription fee and engenders

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43 This is the case because all broadcasters compete in the market for syndicated and other programming. Larger broadcasters can take advantage of economies of scope and scale in their negotiations with studios and other sources of programming. Smaller broadcasters, which may not have the same audience clout as larger broadcasters, may be disadvantaged in this competition.

44 As the Commission has recently noted, "structural regulation imposes far fewer economic costs on the market than regulatory models that use primarily price or case-specific conduct regulation as a way to mitigate strategic, anticompetitive behavior." *Cable Ownership M&O at* ¶ 42.

very limited public interest obligations.[45] In addition, cable and other national media providers are generally not purveyors of local programming and certainly not charged with serving the needs of local communities the way broadcasters are.[46] Although the proliferation of media outlets in today's telecommunication industry provides a marketplace of ideas on a global scale, this does not serve as a substitute for the need of broadcasting to be diverse in and of itself.

### C. THERE IS NO PUBLIC INTEREST BENEFIT IN EXPANDING OR ELIMINATING THE NATIONAL TELEVISION OWNERSHIP CAP.

Networks, having the ability to reach 35 percent of television households nationwide, fully enjoy the benefits and efficiencies of group ownership. Additional economies of scale that networks may achieve by an expansion or repeal in the ownership cap are not worth the resulting harm to competition, localism and diversity.[47] Lacking a compelling public interest justification, the Commission should not modify the ownership cap. To do so would abandon an industry structure based on localism in favor of a structure where a handful of large and powerful networks can exercise concentrated national power in the television marketplace. This would violate the proffered purpose of the 1996 Act – to increase competition – and the Commission's public interest obligations in this biennial review.

It is certainly true that networks may wish to own additional television broadcast stations for several reasons. One reason is that local stations operated by a network can realize economies of scale and provide a profitable investment for the network.[48] Yet, the overall plan under which the television marketplace is regulated provides precious few limitations on the potential investments networks may make. Networks can, and

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45 *In re Review of the Commission's Reg's Governing Television Broadcast, Further Notice of Proposed Rulemaking,* 10 FCC Rcd. 3524, ¶ 66. (1995) ("An over-the-air broadcast television station is required to provide programming responsive to the issues facing it local community, to afford equal opportunities to political candidates, and to provide reasonable access to candidates for federal elective office.").

46 *Notice* at ¶ 6.

47 *See Cable Ownership M&O* at ¶ 14 (finding that raising ownership cap above 30 percent would harm diversity and competition and increase concentration).

48 *See* Testimony of Robert A. Iger, President, ABC, Inc., before the Senate Antitrust, Business Rights and Competition Subcommittee at 3 (July 7, 1998).

regularly do, consider leveraging their assets in ventures that do not implicate the core diversity concerns that motivated Congress to establish the national ownership cap.[49] The Commission should preserve the 35 percent ownership cap, which is a structural regulation that creates only minimal restraints on the economic options available to groups and networks.[50]

## III. PRESERVING THE CABLE/TELEVISION CROSS-OWNERSHIP BAN IS ESSENTIAL TO MAINTAINING A COMPETITIVE BALANCE IN THE VIDEO MARKETPLACE.

The present and future relationship between broadcasting and cable are critical issues that have occupied the attention and analysis of Congress and the Commission for years. Cable, particularly at the local level, remains the dominant gateway for video services to the home. Most recently, the Commission noted that "local markets for the delivery of video programming generally remain highly concentrated and continue to be characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems."[51] Given this state of affairs, NASA urges the Commission to reject measures that would either potentially further enhance cable's concentration in local markets, or that would potentially weaken the ability of broadcasters to compete with cable. Relaxation or elimination of the cable/broadcast ownership rules would do both.

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49 *See, e.g., NBC in Merger Talks with USA, Viacom,* DAILY VARIETY, July 17, 1998; *GE's NBC Unit Is Seeking to Expand in Cable as Broadcast Economics Soften*, WALL STREET JOURNAL, July 16, 1998, at B3.

50 The Commission has recently noted that "structural regulation imposes far fewer economic costs on the market than regulatory models that use primarily price or owner-specific conduct regulation as a way to mitigate strategic, anticompetitive behavior." *Cable Ownership M&O* at ¶ 42.

51 *See Fourth Annual Report* at ¶ 6; *see also Cable Ownership M&O* at ¶ 38 ("As of June 1997, there were more than 64 million cable subscribers representing more than 66 % of all television households in the United States.").

### A. In the 1996 Act, Congress Recognized That Operators of Network-Owned Cable Systems Could Use Their Enhanced Leverage to Engage in Anti-Competitive Practices To The Detriment of Local Broadcast Stations.

The Commission adopted the cable/television cross-ownership rule in 1970, concluding that the rule furthered its "policy favoring diversity of control over local mass communication."[52] In 1980, when reaffirming the rule, the Commission found that cases of "[c]ross-ownership between co-located cable systems and television stations are undesirable in that they involve an inherent conflict between the operation of the two entities that would lessen competition in the economic and ideological marketplace that we seek to promote."[53] In 1984, the Commission again noted the public policy rationale behind the cable/television cross-ownership rule "of increasing competition in the economic and ideological marketplaces."[54]

Congress codified the cable/television cross-ownership rule into a statutory requirement in the Cable Communications Policy Act of 1984.[55] Although the 1996 Act repealed the statutory restriction on cross-ownership, it intentionally left in place the Commission's restrictions on cable/broadcast cross-ownership in order to protect the public interest. This provision was a pragmatic compromise between the House and

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[52] *In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; And Inquiry Into the Development of Communications Technology and Services To Formulate Regulatory Policy and Rulemaking And/Or Legislative Proposals, Second Report and Order,* Docket No. 18397, 23 FCC 2d 816 (1970). The Commission had examined the issue on two previous inquiries before adopting its rule. *See First Report & Order*, Docket No. 15415, 1 FCC 2d 387 (1965); *Notice of Inquiry*, Docket No. 17371, 7 FCC 2d 853 (1967). In 1973, the Commission again considered the rule, concluding:

> Our adoption of [the cable/television cross-ownership] provisions -- designed to foster diversification of control of channels of mass communication -- was guided by two principle goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas.

*Memorandum Opinion and Order*, Docket No. 18397, 39 FCC 2d 377, ¶ 39 (1973).

[53] *In re Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations Relative to Cable Television Systems, and Postponement of Divestiture Requirement of Section 76.501 Relative to Prohibited Cross Ownership in Existence on or before July 1, 1970, Further Notice of Proposed Rulemaking*, Docket No. 20423, 81 F.C.C.2d 150, ¶ 15 (1980).

[54] *Third Report & Order*, Docket No. 20423, 97 F.C.C.2d 65, ¶ 17 (1984).

[55] *See* P.L. 98-549, 98 Stat. 2780, October 30, 1984, adding 47 U.S.C. §613(a)(1).

Senate bills. The original House bill repealed the statutory prohibition on cross-ownership of a cable station by a television station within the same coverage area and prevented the Commission from enforcing its regulations to the same effect.[56] Section 202(i) of the final bill rejected the House's repeal of cross-ownership restrictions, eliminating the statutory prohibition but explicitly leaving in effect the Commission's regulations. The Conference Report emphasized that "[t]he conferees do not intend that this repeal of the statutory prohibition should prejudge the outcome of any review by the Commission of its rules."[57] Rep. Markey, who was actively involved in the Conference Agreement, elaborated: "The conference report expressly did not seek to wipe out the broadcast-cable cross-ownership rule and therefore the *Commission is advised not to expend its limited resources reviewing this issue*."[58]

As both the House and Senate recognized, prohibiting cross-ownership regulations would contradict the goals of the 1996 Act and might even be more threatening to local communities than an increase in the national ownership cap. In particular, during debates Senators expressed fear of local concentration:

> We are very concerned about a circumstance where legislation in the telecommunications area allows such concentration that one entity really in a community can own the newspaper, can own the major television station, can own the cable company, can own it all, control ideas, control thought, and determine what is published, what is not. That is pretty scary. . . . It is moving in the direction of concentration, and it is exactly in the wrong direction.[59]

House members expressed similar sentiments.[60] In addition, dissenters to the House Report, which was rejected in Conference on this provision, noted that "[i]f a national TV network owns a cable system serving a particular locality, it would have tremendous incentive to bypass its affiliate and put its national programming directly on the cable system. We believe repeal of this rule is unwarranted and would have anti-

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56 *See* H.R. Rep. 104-204 at 40-41 (1995).

57 H.R. Rep. 104-458 at 164 (1996).

58 142 Cong. Rec. H1170 (daily ed. Feb. 1, 1996) (emphasis added).

59 141 Cong. Rec. S17848 (daily ed. Nov. 30, 1995) (statement of Sen. Dorgan).

60 *See* 141 Cong. Rec. H8479 (daily ed. Aug. 4, 1995) (statement of Rep. Markey).

competitive effects."[61] After reviewing the history of media concentration in the television industry, Rep. Markey noted that the current regulation of television-cable cross-ownership in local markets not only ensured fair competition but also safeguarded diversity within local communities.[62]

### B. THE CABLE/TELEVISION CROSS-OWNERSHIP RULE IS CRITICAL TO PREVENTING AN UNTOWARD AGGREGATION OF CABLE MARKET POWER.

Cable television systems and broadcast stations do, in fact, compete in local television markets. And cable is a unique competitor to broadcast television – it is a gatekeeper[63] that exercises control over 68 percent, on average, of the homes in the United States.[64] As the Commission recognizes, the local video programming markets remain highly concentrated and dominated by the local cable systems that effectively operate geographic monopolies in the mainstay of the country.[65] In most markets, cable's strongest competitors are the local network affiliates. However, because broadcasters and cable compete for viewers, programming and advertising revenues at the local level, cable has the incentive to engage in anti-competitive practices. For these reasons, it is eminently sensible to prevent cable-television combinations to preserve competition in local markets

If a local cable operator were allowed to own a full-power television in its service area, it would have almost unfettered discretion to discriminate in favor of both its station and its cable programming services. It could manipulate carriage and channel positioning, promote its broadcast station on a multiplicity of cable channels, and offer combination advertising rates. These activities easily could emasculate any strong broadcast competitors, drive weaker broadcast competitors out of the market completely and entirely frustrate new entrants. The result would be the inhibition of competition among local distributors of television programming and competition in the sale of local

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61 H.R. Rep. No. 104-204 at 220 (1995) (statement of Reps. Markey, Studds, and Klink).

62 *See* 141 Cong. Rec. E1572 (daily ed. Aug. 1, 1995).

63 *Turner Broadcasting System, Inc, v. FCC*, 117 S. Ct. 1174 (1997) (recognizing cable's gatekeeper role).

64 *Fourth Annual Report*, Appendix B, Table B-1.

65 *See Fourth Annual Report* at ¶ 11.

television advertising to the detriment of subscribers, non-subscribers and advertisers. Competitors to a television-cable combination would seldom be able to fairly negotiate retransmission consent agreements, for example, and would be forced to elect must-carry; this would diminish broadcasters' discretion under the Cable Competition and Consumer Protection Act of 1992, diminish competition between cable and broadcasting and diminish program offerings that often are brought to consumers as part of retransmission consent negotiations.

Simple examples illustrate the competitive inequities that would result from a cable system and a television broadcast station in the same market being under common ownership. Assume, for example, that WCBS-TV, New York, and Time-Warner cable, the dominant cable operator in New York, were owned by the same entity. The owner of both the station and the system would have unprecedented opportunities in joint advertising sales and joint cross-promotions that all other competitors in the marketplace could not have. Despite the size and sophistication of GE/NBC, Disney/ABC and Fox, these entities would be competing with Time-Warner/CBS on a dramatically skewed playing field. The diversity of programming available to viewers in the New York area would diminish.

Even more dramatically, in the absence of the cable-broadcast cross-ownership rule, there would be no structural regulatory impediment to combined ownership of, for example, AT&T/TCI, GE and NBC by a single entity. Aside from the national consequences of such a combination, consider the *local* effects of such a combination on the Washington D.C. area, in which GE/NBC owns WRC-TV. Again, this national cable/broadcast combination would have unique competitive advantages that could not be replicated by its competitors. And it is most unlikely that companies affiliated with GE/NBC's network competitors would have a fair opportunity to negotiate with GE/NBC cable systems for programming opportunities in connection with retransmission consent – if GE/NBC owned the cable systems in the area in which it programs television stations, the Washington area likely would not have a 24-hour local news service operated by an affiliate of a network that competes with GE/NBC.

Affiliate by-pass – the migration of network programming away from free, over-the-air television to pay cable – is another potential consequence of repeal of this rule.

Assume, for example, that AT&T/TCI and CBS were under common control. This entity could not only create powerful combinations in markets in which CBS owns a television station, but it also could use against its affiliates the option of by-passing affiliates in markets in which CBS does not own a station but in which AT&T/TCI cable has relatively high cable penetration. Clearly, this is a negotiating lever that a network could use to obtain significant concessions from its affiliates even in markets in which the broadcast-cable conglomerate does not own a television station.

Overall, it is clear that the cable/broadcast cross-ownership rule exists to protect against unique competitive injury. Throughout the past twenty-eight years, the Commission has recognized that the policy goals of the cable/television rule "are to increase competition in the economic marketplace and in the marketplace of ideas."[66] The rule is still necessary to foster competition in local television markets and should be retained.

### C. MAINTAINING THE CABLE/TELEVISION CROSS-OWNERSHIP RULE IS CRITICAL TO PREVENTING AN UNTOWARD AGGREGATION OF NETWORK MARKET POWER.

Repeal of the cable/television cross-ownership rule would permit, as a practical matter, combinations of networks and cable MSOs that operate in markets where networks own television stations. This would result in greatly increased network power to the detriment of the public interest.

The relationship between local stations and networks is extremely complex. These relationships encompass issues such as cable carriage, channel placement, affiliation, compensation, program clearances, network promotion, and the geographic and temporal scope of network exclusivity. The advent of digital technology only will increase the complexity of these issues. The interelatedness of the many issues over which affiliates and networks bargain would make it very difficult to police and enforce prohibitions against cable-network anti-competitive conduct.

In addition, as discussed above, the detriments of anti-competition effects of repealing this rule would be felt both in markets in which the network owns both television stations and cable system and those in which it owns only cable systems but

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66 *See e.g., Kilgore Cable TV Company*, 11 FCC Rcd 1684 (1996).

has an affiliation with independently owned stations. Repeal of the cable/television ownership rule will give networks greater incentives to by-pass affiliates. Today, in local markets, if the networks were to by-pass local affiliates, whatever premium they would accrue from the switch would have to be divided with the cable operator, generally a local monopolist with considerable clout who could be expected to keep a very large portion of those additional revenues. Ownership of the cable system would allow the networks to retain 100 percent of the net gain in subscriber revenues. Certainly this "efficiency" would provide a greater incentive for by-pass.

The Commission long has recognized that "[p]romoting fair competition between free over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible."[67] Repealing the cable/television cross-ownership ban would increase concentration in the local market and, as a result, diminish the program choices available to consumers. The question the Commission must answer is not how it can justify retaining the cable/television rule, but how it could possibly square repeal of the rule. Certainly, nothing need or should be done to allow the aggrandizement of cable and network market power and nothing should be done that would further fractionalize or weaken the television broadcast system. Repealing the cable/broadcast cross-ownership rule would do both, and therefore is contrary to the public interest.

### D. There Is No Justification For Repealing Or Significantly Relaxing the Cable/Television Cross-Ownership Rule.

There is no reason to believe that repeal of the cable/television cross-ownership rule will provide any benefits of substance. The *Notice* questions whether cable/television joint ownership "may" permit an entity to realize cost savings that "could" be used to provide better services to the public and advertisers.[68] The short answer is that there simply is no reason to think such "economies" would exist and even if they did exist, there is no basis to believe they would be passed on to audiences and advertisers as the Commission postulates. With such illusory or nonexistent benefits

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67 *See Program Exclusivity in the Cable and Broadcast Industries*, 64 R.R.2d 828, 840 (1988).

68 *Notice* at ¶ 51.